Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ROBERT A. JONES, et al.,
Petitioners,

v.

KENTUCKY DEPARTMENT OF MILITARY AFFAIRS; AND
KENTUCKY NATIONAL GUARD,
Respondents.

On Petition For Writ of Certiorari
To The Supreme Court of Kentucky

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supremacy Clause and Militia Clause of the United States Constitution limit what rights the state may provide to its State National Guard employees while under state authority, thereby preventing a State Guard member from pursuing claims of discrimination under a State civil rights statute.

2. Whether the Supreme Court of Kentucky erred in holding that Perpich v. Department of Defense, 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990) requires members of the National Guard to be at all times under the exclusive control of the federal government, thereby totally preventing pursuit of their state civil rights.

3. Whether Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which held that the United States government is not liable for injuries to servicemen which are "incident to military service," was intended to preclude a state court from hearing a discrimination claim brought against the State National Guard.

RULE 14.1(b) LIST OF PARTIES

Petitioners include:

Robert A. Jones
Cynthia White
Reginald P. Youngblood
Larry White
(Real Parties in Interest)

Hon. Roger L. Crittenden, Judge
Franklin Circuit Court

Respondents include:

As appears on cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Kentucky (App., *infra*, 1a - 29a) is reported at 2002 WL 31819664, and is to be published. The opinion of the Kentucky Court of Appeals (App., *infra*, 30a - 44a) is reported at 2001 WL 958909. The judgment of the Franklin County Circuit Court (App., *infra*, 45a - 54a) is unreported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was issued on November 21, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides in relevant part: "[T]he Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

The relevant provision of the Militia Clause of the United States Constitution provides for:

"Organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]" U.S. Const. art. I, Section 8, cl. 16.

The relevant provision of Title VII, the federal Civil Rights Act, 42 U.S.C.A. Section 2000e, is reproduced at App., *infra* 55a - 63a.

The Kentucky Constitution, Section 75, provides in relevant part: "[The Governor] shall be Commander-in-Chief of the army and navy of this Commonwealth, and of the militia thereof, except when they shall be called into the service of the United States...."

The Kentucky Constitution, Section 220, provides: "The General Assembly shall provide for maintaining an organized militia, and may exempt from military service persons having conscientious scruples against bearing arms; but such persons shall pay an equivalent for such exemption."

The Kentucky Constitution, Section 221, provides: "The organization, equipment and discipline of the militia shall conform as nearly as practicable to the regulations for the government of the armies of the United States."

The relevant provision of the Kentucky Revised Code, KRS 36.010, provides: "The Department of Military Affairs shall be attached to the Office of the Governor, have charge of and be responsible to the Governor for the proper functioning of the Kentucky National Guard, militia, and all other military or naval matters of the state...."

The relevant provision of the Kentucky Civil Rights Act, KRS 344, et seq., is reproduced at App., *infra* 64a - 68a.

STATEMENT OF CASE

I. THE NATURE OF THIS CASE CONCERNS A STATE COURT'S AUTHORITY TO ADJUDICATE STATE CIVIL RIGHTS CLAIMS BROUGHT BY MEMBERS OF ITS STATE MILITIA.

The primary issue in this case is the justiciability of civil rights claims brought by State National Guard members in a state court action. The claims were raised by four (4) Kentucky State Guard members while under state authority, and are based on sexual and racial acts of discrimination and harassment in violation of the Kentucky Civil Rights Act. (Kentucky Revised Statutes, Section 344, et. seq.)

The Kentucky Attorney General, who defended the claims on behalf of the Kentucky Department of Military Affairs and the Kentucky National Guard (hereafter "Respondents"), have asserted that such claims are not justiciable under state law since the claimants are exclusively under the control of the federal government. The State Attorney General initially raised the "state v. federal" jurisdictional issues presented herein by filing for summary judgment with the Franklin Circuit Court, the trial court below.

II. THE FRANKLIN CIRCUIT COURT HELD WHILE GUARDSMEN ARE NOT IN ACTIVE FEDERAL SERVICE, THEY ARE SUBJECT TO GOVERNANCE AND JURISDICTION OF THE STATE.

The issue presented herein was initially addressed by the Franklin Circuit Court ("trial court"), when it partially overruled Respondent's Motion for Summary Judgment. In holding that the state court ***did in fact*** have jurisdiction over the Petitioners' civil rights claims, the trial court properly concluded: "[w]hile the [Petitioners] were under the exclusive command of the Kentucky National Guard, the laws of the Commonwealth of Kentucky applied."[1]

Respondents filed, as an original action, a Writ of Prohibition with the Kentucky Court of Appeals for a review of this jurisdictional issue.

III. THE KENTUCKY COURT OF APPEALS HELD THAT THE KENTUCKY COURTS HAVE NO JURISDICTION OVER ITS STATE NATIONAL GUARD.

The Kentucky Court of Appeals granted Respondents' Writ of Prohibition regarding the jurisdictional issues. The Court of Appeals, in a 2-1 split decision, reversed the decision of the trial court by holding that Kentucky state courts have no jurisdiction over the claims raised by Petitioners.

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[1] (Pet. App. 51a)

While the Court of Appeals recognized that KRS 344 specifically includes within its provisions "the state, any of its political or civil subdivisions or agencies," the majority held that federal law preempted Petitioners' redress in state court due to Petitioners' status as state National Guard members. The majority's holding relied on Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), as well as the Supremacy Clause and Militia Clause of the United States Constitution.[2]

Petitioners appealed this decision to the Supreme Court of Kentucky.

IV. THE SUPREME COURT OF KENTUCKY RENDERED A 4-3 SPLIT DECISION, HOLDING THAT KENTUCKY STATE COURTS HAVE NO JURISDICTION IN CLAIMS AGAINST THE STATE NATIONAL GUARD, AS SUCH CLAIMS ARE PREEMPTED BY FEDERAL LAW.

The Supreme Court of Kentucky, in a 4-3 split decision, affirmed the Kentucky Court of Appeals' decision, by holding:

> (1) The Supremacy Clause and Militia Clause preempt a state court's ability to hear Kentucky State Guard members' claims;
>
> (2) Under the Militia Clause, and the federal case law defining it, the State Guard members cannot pursue state claims, since they are at all times under the exclusive control of the United States armed services; and

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[2] (Pet. App. 37a, 39a)

(3) This Court's decision in Feres prevents a state court from hearing claims concerning discrimination, since such would constitute a state court's interfering with the military "discipline" process, and thus "incident to military service."

The Supreme Court decision contained two separate and strong dissenting opinions. Justice Johnstone's dissent is the one that shows a thorough understanding of the issues as they relate to federal law. Certainly that is true in relation to the majority's opinion, which is premised on erroneous misapplications of important federal policy as it relates to states' rights.

As Justice Johnstone notes, no express federal preemption exists to deny a state Guardsman's adjudication of civil rights claims in state court. Justice Johnstone specifically distinguishes the federal military's access to civil rights claims from those of the state Guard members by holding, "though courts may hold that Congress exempted the federal military from Titile VII civil rights claims, that limitation is a far cry from implied preemption preventing states from extending those rights to state Guards."[3]

As Justice Johnstone also states: "[w]hile the majority fashions an eloquent argument in support of its position, that argument merely attempts to evade the democratic and unambiguous purpose of the Kentucky Civil Rights Act, which is '[t]o safeguard

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[3] (Pet. App. 24a)

all individuals within the state from discrimination.'"[4]

Justice Johnstone is perhaps most critical of the majority's reliance on the premise that "discrimination" is "incident to military service" and thus prohibited by the Militia Clause. "All of this discussion about discipline just diverts attention from the facts of the present case. The complainants in this case did not file suit based on a disciplinary matter, they claimed they were discriminated against." (Johnstone's Dissenting Opinion, Pet. App. 21a).

Justice Johnstone concluded:

> Failing to promote a Guardsman because of race, transferring a Guardsman because of race, or calling a Guardsman "nigger" or "black bitch," if true, is not "discipline" of the type the majority claims is "prescribed by Congress." Nor is it any form of "discipline" that could be properly sanctioned, either by the military or any other institution. And it certainly is not the type of protected military action that is, according to the majority, designed to "foster instinctive obedience, unity, commitment and esprit de corps."[5] Such treatment demonstrates unabashed bigotry.

Johnstone's Dissenting Opinion, (Pet. App. 21a).

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[4] (Pet. App. 19a)

[5] (Pet. App. 22a)

V. THE ISSUES PRESENTED HEREIN ARE OF NATIONAL IMPORTANCE, AS EVERY STATE HAS A NATIONAL GUARD.

Kentucky is not the only state which maintains a National Guard, and to deny these members civil court redress for violations of their civil rights contradicts the very freedoms upon which this Nation was built. Thus, the states need guidance on how to address jurisdictional issues with respect to claims brought by State National Guard members when its members are not in active federal service.

Moreover, these issues concern the inherent right of individual states to bestow additional liberties to their citizens than what the federal government provides. Allowing the Kentucky Supreme Court's ruling to stand would unnecessarily restrict state sovereignty in a matter of great national importance - civil rights.

REASONS FOR GRANTING THE WRIT

I. THIS COURT NEEDS TO CORRECT THE SUPREME COURT OF KENTUCKY'S DECISION WHICH ERRONEOUSLY INTERPRETED THE SUPREMACY CLAUSE AND MILITIA CLAUSE TO DENY ITS OWN CITIZENS THEIR CIVIL RIGHTS.

Preemption by the Supremacy Clause of the United States Constitution occurs only when (1) Congress expressly intends to preempt a state law; (2) Congress "occupies the field" of regulation; or (3) compliance with both federal and state regulations is a physical impossibility. Gustafson v. City of Lake Angelus, 76 F.3d 778, 782-83 (6th Cir., 1996). The focus of a preemption inquiry under any of these instances is "congressional intent". Id. at 783.

The Kentucky Supreme Court majority conceded in its opinion that no express preemption exists as to Petitioners' claims, but then relies on Feres, and its progeny, to hold that Congress has impliedly "occupied the field" with regard to discrimination suits against State National Guard units. That court held, "although Congress has not enacted statutes expressly preempting state regulation of discrimination suits against military authorities, the federal scheme ... strongly suggests that the field has been impliedly preempted by federal law." (Pet. App. 14a). This holding is an overextension, and thus a misinterpretation, of the clear and stated purpose espoused in Feres itself,

which was to prevent suits by **federally active servicemen** against the **federal government.**[6]

Petitioners here are State National Guard members serving in their state roles. They allege discrimination (racial and gender) claims under the Kentucky Civil Rights Act (KRS 344, et seq.)[7] against state agencies, namely the Kentucky Department of Military Affairs and the Kentucky National Guard. It is important to note that these state agencies are not otherwise immune from these civil rights claims.[8]

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[6] *See* Feres, supra, at p. 2.

[7] KRS 344.040 makes it unlawful for an employer to discriminate against an individual on the basis of race or sex, as well as other classes. KRS 344.030 defines "employer" as "a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or proceeding calendar year ..." and "KRS 344.010(1) defines "person" to include "the state, any of its political or civil subdivisions or agencies." Id.

[8] The Kentucky Civil Rights Act applies to state agencies, and such agencies cannot claim sovereign immunity. In Dept. of Corrections v. Furr, 23 SW3d 615, 617 (Ky. 2000), the Kentucky Supreme Court held that the state has waived sovereign immunity for claims under KRS 344:

> What hollow words indeed if the safeguard against discrimination does not include the right to be free from acts of discrimination committed by the Commonwealth itself, or in its name.
>
> ....
>
> To immunize the Commonwealth from the application of the Kentucky Civil Rights Act frustrates the act's purpose and intent, deprives many of its citizens of its protection, and renders meaningless its pledge to safeguard all individuals from discrimination.

As the majority correctly notes, [t]he Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to "maintain and regulate the Militia ." Kentucky Constitution §220. Moreover, the Governor is the Commander-In-Chief of the militia, except when it is called into the service of the United States. Ky. Constitution § 75. These concessions by the majority are in direct compliance with this Court's decision in Perpich v. Dept. of Defense, 496 U.S. 334; 110 S.Ct. 2418, 2425; 110 L. Ed. 2d 312, 325 (1990), that state guardsmen are in the service of the state "unless and until ordered to active duty." Id., at 345. The obvious conclusion, one that the majority blatantly ignored, is that when the Kentucky National Guard has **not** been called into active service, it remains under the regulation of the Kentucky Legislature.

As to the majority's opinion regarding the Militia Clause, it correctly held that the Militia Clause of the United States Constitution clearly gives Congress power over "military affairs", and specifically power over disciplining the militia.[9] Its argument fails when it extends such power of discipline to acts of discrimination. Petitioners' complaints are not based on anything related to military discipline, but on acts of blatant discrimination. As Justice Johnstone stated in his dissent, the discrimination claims brought by Petitioners were certainly not the type of discipline "prescribed by Congress". What they are, he concludes, are "unabashed bigotry". (Pet. App. 22a). The majority insisted that discrimination falls into

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Id. (emphasis in original).

[9] *See* Kentucky Constitution, Section 221.

the regime of "military discipline" and thus held that the Militia Clause precluded Petitioners' claims.

"The military is not the final arbiter of the constitutionality of its policies, and it must operate within the parameters established by statute in the Constitution." Id. at 67 (as cited by Holmes v. California Army National Guard, 920 F.Supp. 1510 (ND Cal., 1996).

The Kentucky Supreme Court also relies on the limitations of Title VII[10] as "proof" that the federal government has "preempted the field" on a civil rights claim brought by a state militia person. This argument is without merit. First, there is no conflict between Title VII and the Kentucky Civil Rights Act,[11] which would warrant preemption. Even though the federal government is exempted from suit under Title VII, this is not a limitation which prevents the states from extending their citizens a greater protection than the federal law allows. *See* Mills v. Rogers, 457 U.S. 291, 102 S.Ct.

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[10] 42 USC 2000e

[11] The Supreme Court of Kentucky recognized this in Meyers v. Chapman Printing Co., 840 S.W.2d 814 (Ky. 1992): "One important purpose of the Kentucky Civil Rights Act was to incorporate the anti-discrimination 'policies embodied' in the Federal Civil Rights Act of 1964 ... as amended.... **But there are further purposes expressed in the Kentucky statute not specified in the Federal**...." Id. at 817. The Court further stated, "Whereas the policies embodied in the Kentucky Act are the same as the federal counterpart, **the statutory remedy provided through the court system differs markedly because of these further policy statements**...." Id.

2442, 2448-2449 (1982).[12] In fact, Kentucky's civil right statute was enacted to clearly hold broader protections than Title VII. *See* Meyers, supra, at p. 10, FN 10.

In sum, the Supreme Court of Kentucky's holding immunized its own Department of Military Affairs and State National Guard from liability by use of the Supremacy Clause and the Militia Clause. As the majority admits, none of the rationales it relies upon can be found in any precedent established by this Court. Instead, the majority admits that such rationale is "implied" in these important constitutional provisions.

This Court must correct this erroneous "implication" by the Kentucky Supreme Court regarding these most powerful federal constitutional provisions. Such an implication dangerously tramples on important doctrines of state sovereignty, and imposes upon a matter of national importance-civil rights.

II. THE SUPREME COURT OF KENTUCKY HAS DECIDED IT HAS NO JURISDICTION OVER ITS OWN STATE MILITIA, A HOLDING WHICH IS IN DIRECT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, MOST SPECIFICALLY PERPICH V. DEPARTMENT OF DEFENSE, 496 U.S. 334, 110 S.CT. 2418, 110 L.ED.2D 312 (1990).

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[12] "State law may recognize liberty interests more extensive than those protected by the Federal Constitution." Mills, 102 S.Ct. at 2448-2449.

A. Each State National Guard Is Subject To Its Particular State's Laws When Not Federally Activated.

Every state's National Guard has long been recognized as entities separate and apart from each other, and remain under the control of their respective state until called to federal service. (See Perpich v. Dept. of Defense, et al., 496 U.S. 334, 340(1990).[13]

In fact, members of the National Guard are subject only to the rules established by their individual state until called to federal service: "[W]hen drafted into federal service by the President, members of the Guard so drafted should 'from the date of their draft, stand discharged from the militia, and shall from said date be subject to' the rules and regulations governing the Regular Army." Id. at 344.

Consequently, when Guardsmen are not drafted into federal service, they are subject to the

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[13] The Court in Perpich sets forth an insightful history of the formation of the modern National Guard system. The Court began its review stating: "Two conflicting themes, developed at the Constitutional Convention and repeated in debates over military policy during the next century, led to a compromise in the text of the Constitution and in later statutory enactments. On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national Army and also to organize "the Militia." Id. at 340.

rules established by their own individual state. To prohibit each individual state's ability to control its own National Guard would be an assault to each state's Constitutional right to sovereignty.[14]

B. The Ruling By The Supreme Court Of Kentucky Directly Conflicts With This Court's Holding In Perpich v. Department of Defense.

In Perpich v. Department of Defense, this Court recognized that the National Guard exists in "'two overlapping but distinct organizations' ... the National Guard of the various States and the National Guard of the United States." Perpich, 496 U.S. at 345. Members of the National Guard maintain but one association at a time. "[Members of the State National Guard] must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat -- **only one of which is worn at any particular time.**" Id. at 348. (emphasis added). In fact, it is not until a member of the Guard is ordered to active duty that he or she is relieved of his or her status in the State Guard. See Perpich, supra, at p. 12.

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[14] It has long been recognized that states may provide for broader protections to their citizens than those found in the federal system. "Within our federal system the substantive rights provided by the Federal Constitution define only a minimum. State law may recognize liberty interests more extensive than those protected by the Federal Constitution. ...*If so, the broader state protections would define the actual substantive rights possessed by a person living within that State.* Mills v. Rogers, 457 U.S. 291, 102 S.Ct. 2442, 2448-2449 (1982). (emphasis added).

In the cases before this Court, Petitioners allege discrimination arising out of their employment with the Kentucky National Guard. Each discriminatory act occurred during Petitioners' civilian employment with the Kentucky Department of Military Affairs and, more specifically, the Kentucky National Guard. The true status of Guard members has been well established. "[U]ntil called into [federal] service, members of the National Guard **remain state**, rather than federal officers." Perpich v. Dept. of Defense, 496 U.S. 334 (1990). (emphasis added.)

In contradiction to the ruling of this Court in Perpich, the Supreme Court of Kentucky held that since the Kentucky National Guard receives federal funds, and since "[c]ongress also has created the National Guard Bureau, ..., to oversee state Guard units and to ensure compliance with federal statutory and regulatory requirements regarding military training, discipline, and readiness," the Kentucky National Guard is under the **exclusive control** of the federal government. (Pet. App. 6a).

The Supreme Court of Kentucky, in fact, characterizes the Kentucky National Guard as a ***strictly federal military unit***, in obvious disharmony with this Court's ruling in Perpich. The Supreme Court of Kentucky, in its majority opinion, even directly refers to the State National Guard as "Army," absolutely refusing to distinguish the Guard's separate state status: "[a] soldier in the Army is not free to quit his job, cannot be fired, and is subject to military discipline and military law." (Pet. App. 9a).

Petitioners agree that if they were solely members of the United States Army, the majority below would be undoubtedly correct. Petitioners, however, are members of the **Kentucky National Guard**, and they enjoy a **dual enlistment** with the federal and state governments. Although it is very clear that at any given moment, the federal government may activate the state Guard to federal status, the Guard remains under state authority until that activation. *See* Perpich, 496 U.S. at 345.

The Kentucky National Guard operates under the umbrella of the Kentucky Department of Military Affairs, which is responsible for "the proper functioning of the Kentucky National Guard." KRS 36.010. As such, both are considered state agencies and are subject to liability under KRS 344, the Kentucky Civil Rights Act.[15] It thus follows that when members of the Kentucky National Guard are under the authority and control of the Commonwealth of Kentucky, they may take advantage of the Kentucky Civil Rights Act for discriminatory acts that occur.[16]

The Dissenting Opinion below correctly stated, "[t]he fact that the Kentucky National Guard receives federal funds does not alter the status of the Guardsmen: 'the issue of status depends on command and control and not on whether ... state or federal funds are being used....' In this case, none of

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[15] *See* Department of Corrections v. Furr, 23 S.W.3d 615, 617 (Ky., 2000).

[16] The purpose of the Kentucky Civil Rights Act is "to safeguard all individuals within the state from discrimination." KRS 344.020 (emphasis added).

the plaintiffs had been called to active duty, so they were still under the state's control." (Pet. App. 19a).

Therefore, the Supreme Court of Kentucky erred in holding the Kentucky National Guard employees were not subject to KRS 344, and it directly violated this Court's opinion in Perpich by doing so.

C. The Ruling Of The Supreme Court Of Kentucky Directly Conflicts With Holdings Of Other States.

The Supreme Court of Kentucky is not in accord with other state jurisdictions, and at least seven other states have directly contradicted its holding. Such jurisdictions have clearly held, in accord with Perpich, that State National Guard members, when not activated by the United States, are under the control and authority of the particular state in which they are situated. A complete survey of the states reveals, in fact, that Kentucky's holding is the only one which has ever directly contradicted Perpich.[17] The following is a brief overview of such

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[17] Other cases which have ruled similarly are distinguishable from the case at bar. A member of the New York Air National Guard could not bring age discrimination claims under the state Human Rights Act, as a federal statute specifically set out the regulation of personnel criteria. *See* Kolomick v. New York Air National Guard, 219 A.D.2d 367 (N.Y.A.D. 2 1996). Also, a National Guardsman was denied state worker's compensation claims because the state statute did not include Guardsman in active service as "employees." *See* Sullivan v. Industrial Claims Appeals Office, 22 P.3d 335 (Colo. Ct.

state opinions which uphold Perpich, and which the Supreme Court of Kentucky contradicts.

The U. S. District Court of Kansas held that a Guardsman was a "state agent" for purposes of applying a criminal statute. *See* United States v. Forste, 980 F.Supp. 395 (D. Kan., 1997).

In Wright v. Department of Defense & Veterans Services, 623 A.2d 1283 (Me. 1993), the Supreme Judicial Court of Maine held that a state court had subject matter jurisdiction over a Guardsman's state law claims. Id.

The Commonwealth Court of Pennsylvania held that an Army National Guard member's status, while under state authority, was a member of the state militia, and was therefore a state employee for purposes of determining whether the state court had jurisdiction to review Adjutant General's decision to terminate him from the program. *See;* Kise v. Department of Military and Veterans Affairs, 784 A.2d 253 (Pa., 2001), *but see* Moore v. Pennsylvania Department of Military and Veterans Affairs, 216 F.Supp.2d 446 (E.D. Pa., 2002).[18] The court also

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App. 2000), Farrier v. Connor, 466 N.E.2d 557 (Ohio, 1984)(Active Guard member not considered "employee" when not *active* state member). *But See* Kaya v. State of Hawaii, Dept. of Defense, 809 P.2d 1136 (Haw. 1991)(Worker's compensation statute allowed State National Guardsmen to recover benefits, whether under federal or state authority at time of injury).

[18] The Eastern District of Pennsylvania, in Moore v. Pennsylvania Department of Military and Veterans Affairs, 216 F.Supp.2d 446 (E.D. Pa., 2002), held that the Pennsylvania Department of the Military and Veterans

plainly stated that military members of the National Guard are employees of the states. Kise, id. at 256.

The Supreme Court of Montana has held that four members of the Montana Army National Guard made a sufficient showing that they were not in "active federal service" at the time of the alleged harassment, thus establishing jurisdiction in the state court. Grove, et al. v. Montana Army National Guard, 872 P.2d 791 (Mont. 1994). *Also see* Trankel v. State, Department of Military Affairs, 938 P.2d 614 (Mont. 1997), holding that a member of Montana National Guard could bring state action for injuries sustained due to negligence of Montana Department of Military Affairs.[19]

The Supreme Court of Ohio, in Sorrentino v. Ohio National Guard, 560 N.E.2d 186 (Oh. 1990), held that Ohio courts have jurisdiction to decide cases regarding discharge of members of the Ohio National Guard who are not in federal service. Id.

In reverse application, the Eastern District of Missouri held that as a National Guardsman had been called into active duty by the federal government, he could not pursue worker's compensation under the state. *See* Daniels v. Missouri Army National Guard, 902 S.W.2d 301 (Mo. App. E.D. 1994).

Affairs is immune from suit under the Pennsylvania Human Rights Act **in federal court.** Id.

[19] In the Supreme Court of Kentucky decision, the majority did not even address whether the Guard members were or were not in state or federal service at the time the acts of discrimination occurred (though they were clearly in state), but determined Petitioners were always and exclusively under federal control.

The opinion of the Supreme Court of Kentucky undoubtedly contradicts the holdings of the state decisions set out above. That Court instead held that even though Petitioners were under state control and were specifically serving the Department of Military Affairs in their civilian status, Kentucky courts had no jurisdiction to hear their state discrimination claims.

D. The Ruling Of The Supreme Court Of Kentucky Directly Conflicts With The Ruling Of The Sixth Circuit Court Of Appeals In Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999).

In the keynote 6th Circuit case interpreting the "state vs. federal" status of the Kentucky National Guard, Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999), the court considered whether Kentucky National Guard members who took part in a Marijuana Strike Force did so in violation of a federal statute, specifically, The Posse Comitatus Act.[20] In determining that the federal Act did *not* apply to the Kentucky Guardsmen **because of their status as state servicemen,** the court considered the issue of ***state versus federal control*** as pivotal. "The issue of status depends on command and control and

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[20] The Posse Comitatus Act, 18 U.S.C. § 1385, states: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both."

not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof." Id. at 473.

The Gilbert Court condoned the use of Kentucky National Guardsmen for purely state purposes while those members were under state control. It would be an absurd result to require members of the Kentucky National Guard to expend their efforts for a "purely state goal", and at the same time withhold the protections the Commonwealth affords to every other state worker under its civil rights act. This would allow National Guard members to be subjected to all forms of discrimination with no recourse, which flies in the face of the purpose behind the state civil rights act.

Considering this Court's position on the status of National Guard members, it is clear that Petitioners' status in this case was entirely under state authority. In order for a member of the National Guard to have his or her status changed from state to federal, a Guardsman must be "ordered into active federal duty by an official acting under a grant of statutory authority from Congress .... **Only when 'that triggering event occurs [does] a Guardsman become a part of the Army and lose his status as a state serviceman.'"** Gilbert at 473, citing United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997) (emphasis added).

At no time during the activities surrounding the case below did a "triggering event" occur which would have caused a change in Petitioners' status from state to federal. Therefore, Petitioners remained entirely under state control and purview.

As stated previously by the Kentucky trial court in first deciding this issue in Petitioners' favor: "while the Petitioners were under the exclusive command of the Kentucky National Guard, the laws of the Commonwealth of Kentucky applied. This Court now holds that the Kentucky National Guard, while under state control, must abide by the provisions set forth in KRS 344."[21]

Although Perpich and Gilbert clearly establish that members of the Kentucky National Guard, as employees of the Department of Military Affairs, are officers of the state and not the federal government until and unless they are called into federal service, the Supreme Court of Kentucky refused to follow the same. The fact that the majority of the Supreme Court of Kentucky absolutely refused to address the distinction between the federal military and Kentucky Guard members but determined the members were always and exclusively under federal control, renders its decision inherently questionable.

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[21] (Pet. App. 51a)

III. THE SUPREME COURT OF KENTUCKY HAS DECIDED THAT FERES V. UNITED STATES, 340 U.S. 135, 71 S.CT. 153, 95 L.ED. 152 (1950), EXCLUDES STATE MILITIA MEMBERS FROM PURSUING STATE CLAIMS IN STATE COURTS, WHICH IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS BEEN INCONSISTENTLY APPLIED AMONG THE VARIOUS STATES, AND IT IS A QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Although The Feres-Chappell Doctrine Is A Viable Concept In Interpreting Jurisdictional Issues Raised By The Supremacy Clause And The Militia Clause, It Has Never Been, Nor Is It Now, A Complete Preclusion To All Military Claims.

Two keynote cases of this Court, Feres v. United States, 340 U.S. 135 (1950), and Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed. 2d 586 (1983), exist as the leading opinions in jurisdictional questions regarding the Supremacy Clause and Militia Clause when addressing military claims. Although both cases allow for the exclusion of certain types of military claims, many later cases by this Court have modified and even criticized the original doctrines.[22] The resulting precedent gives

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[22] The inherent shortcomings of Feres were pointed out in United States v. Johnson, 481 U.S. 681, 107 S.Ct. 2063, 95

way to misinterpretation and inconsistencies among this nation's courts.

In Feres, this Court essentially declined to extend the Federal Tort Claims Act where a claimant on active duty sustained injury from the negligence of another armed forces member. This resulted in the Court holding that the federal Government is not liable under the Federal Tort Claims Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Id. at 146. In arriving at this decision, the Court acknowledged the importance of having an alternate remedy available for the servicemen.[23]

In Chappell,[24] this Court recognized that, in dealing with military matters, the courts should take certain precautions: "[i]n construing a statute that touches on [military] matters ... courts must be careful not to 'circumscribe the authority of military commanders to an extent never intended by Congress.'" Id.

Yet, the Court affirmatively acknowledged a military personnel's inherent right to redress in civilian courts: "[T]his Court has never held ... that

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L.Ed.2d 648 (1987), a Federal Tort Claims Act case involving a serviceman negligently killed while on duty. The dissenting opinion, which included four Justices, eviscerated Feres.

[23] The Court noted the servicemen have available to them a "system of simple, certain and uniform compensation for injuries or death of those in armed services." Id. at 144.

[24] Chappell held that federal military personnel could not bring actions against their superiors for violations of constitutionally protected rights. Id. at 305.

military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Chappell, 462 U.S. at 304.

The Feres-Chappell Doctrine prohibits the pursuit of claims that ask the Court to "tamper with the established relationship between enlisted military personnel and their superior officers." Chappell, id. at 300. The Court further defined such authority as "a commander's ability to preserve morale and good order among his troops." Brown v. Glines, 444 U.S. 348, 360, 100 S.Ct. 594, 602-603, 62 L.Ed.2d 540 (1980).

As this Court has observed, military decisions are entitled to substantial deference, but such deference should not be construed to conclude that Congress is free to disregard the Constitution when it acts in the area of military affairs. Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed. 2d 478 (1981).

Clearly, the Feres-Chappell Doctrine does not present an absolute bar for military personnel to seek redress in the courts. Since this Doctrine leaves open the possibility of redress, it seems elementary that a state court's consideration of a Guardsman's civil rights claims, brought under that state's statute, would be permitted. This circumstance (which exists in the present case) would be the least likely to "tamper" with the military scheme, in accord with Chappell.

B. The Supreme Court Of Kentucky Misapplied This Court's Decision In Feres And Its Progeny By Overextending Its Application.

In the decision below, the Kentucky Supreme Court overextended the application of both Feres and Chappell by erroneously concluding their application precluded state Guard members' civil rights claims in state court.

The application of the Feres-Chappell Doctrine is based on the premise that a serviceman's claim which is "incident to military service" cannot be brougnt against the federal government. The Supreme Court of Kentucky, however, ignored this essential premise. Instead, that Court mischaracterized Petitioners' claims by holding that the discrimination experienced by Petitioners resulted from "military discipline."

1. The allegations of discrimination made by Petitioners cannot be summarily dismissed under the guise of "military discipline."

The Supreme Court of Kentucky failed to inquire whether Petitioners' discrimination claims were related to military discipline, nor did that Court delineate Petitioners' status at the time of the discriminatory events. Instead, the state Court simply concluded that the relationship between the discriminatory acts and military discipline existed.[25] Such determination is clearly erroneous.

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[25] Stating the military is a "specialized community" governed under a "separate discipline" from a civilian. (Pet. App. 6a-7a).

The position adopted by the Supreme Court of Kentucky is that discrimination such as that suffered by Petitioners is "discipline," as defined by the Militia Clause.

Yet, as the trial court below had concluded: "the allegations of discrimination made by the [Petitioners] cannot be summarily dismissed as non-justiciable under the guise of military discipline."[26]

The claims of Petitioners are **not** focused on an act of discipline, but instead on racial comments and activities so egregious that one cannot credibly relate them to the Guard's discipline process.

Calling a soldier "nigger" is discrimination, pure and simple. It would be more than shocking to excuse it as being "according to the discipline prescribed by Congress," as ultimately held by the Supreme Court of Kentucky. To uphold the decision below would grant the Kentucky National Guard the authority to subvert the most fundamental of Constitutional protections - the right for all persons to be treated equally.

The Kentucky National Guard's blatant discriminatory acts against Petitioners should not and cannot hide behind the false shield of "military discipline." At the very least, the matter should be a factual determination for the jury.

2. <u>The Feres-Chappell Doctrine does not apply to this case.</u>

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[26] (Pet. App. 51a)

The Feres-Chappell doctrine does not apply to Petitioners' lawsuits, as such suits do not "call into question the discipline, supervision, and control of a serviceman." United States v. Shearer, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed. 2d 38 (1985).

The discriminatory treatment to which Petitioners were subjected falls far short of passing for "discipline, supervision, and control of a serviceman," as required to meet the Feres-Chappell threshold. Treating soldiers or anyone else differently because of the color of his skin or her sex is bigotry pure and simple, and must not be construed as any form of military decision.

The Commonwealth's philosophy of equal protection must also apply to individuals in the Kentucky National Guard. To deprive these individuals of the protections that the Commonwealth so strongly advocates, based solely upon his or her association with the Kentucky National Guard, would not only frustrate the purpose and intent of the Kentucky Civil Rights Act, but would send the message that such acts have no remedy because of federal preemption.[27]

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[27] The purposes of KRS 344 are clear:

To safeguard **all individuals within the state from discrimination** ... thereby to protect their interests in personal dignity and freedom from humiliation, **to make available to the state their full productive capacities** ... to preserve the public safety, health, and general welfare, and to further the interest, rights, and privileges of individuals within the state. KRS 344.020(1)(b). (emphasis added).

More specifically, as concerns this case, KRS 344.040(1) provides:

It is unlawful practice for an employer:

C. Feres Is Being Inconsistently Applied Among The Various States As To State National Guard Members.

The few cases that have applied Feres in state law claims evidence a clear split exists among the states.

The Montana Supreme Court in Trankel v. Department of Military Affairs, 938 P.2d 614 (Mont. 1997), held that Feres did not preclude a Guardsman from bringing a claim under the State Tort Claims Act, as the Guardsman was under state authority when his injuries commenced. Id. *Also see* Day v. Massachusetts Air National Guard, 167 F.3d 678 (1st Cir. 1999) (Holding that Feres did not apply to the Guardsman's state law claims against their supervising officers). That court held that Feres did not apply in such a situation.

Yet, in the case at hand, the Supreme Court of Kentucky did not give consideration to the status of the Guardsmen when concluding Feres barred their state claims. That court merely concluded that the Guardsmen held positions in "the military," and automatically assumed Feres applied. *Also see* Oxley v. Department of Military Affairs, 597 N.W.2d 89, (Mich. 1999) (Michigan Supreme Court held that a National Guard technician was not an employee of the state since he was not under active state Guard when injuries commenced).

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(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, condition, or privileges of employment, because of the individual's race, color, religion, national origin, sex ...

These contradictory decisions are indicative of the uncertainty courts have experienced in applying Feres to cases involving the National Guard.

As the trial court below noted, the various circuits are split as to the appropriate standard for determining the justiciability of military related suits in civilian courts. The Sixth Circuit has developed a "per se test" of whether the activity was "incident to military service." Under this analysis, "the result depends on the 'relevant links' between the Armed Forces and the service member's activity requiring a 'measuring of the degree to which the activity is divorced from or related to military service.'" Woodside v. United States, 606 F.2d 134 (6th Cir. 1979) (citations omitted).

Other jurisdictions have applied different tests. See, e.g., Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1985); Knutson v. Wisconsin Air National Guard, 995 F.2d 765 (7th Cir. 1993).

These tests yield differing results, and clearly do not address considerations for members of the National Guard of the various states.

In sum, while there are a progeny of cases across the United States which hold that a serviceman cannot bring suit against the United States for various injuries and wrongs endured by the serviceman, most of these cases can be distinguished from the case at hand.[28] In most of the

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[28] While the following cases consider application of state laws to members of the military, each is easily distinguishable: Day v. Massachusetts Air National Guard, 167 F.3d 678 (1st Cir. 1999), applied Feres to federal

cases, there is some federal aspect to the claim, either the plaintiff is active in the federal military, he is suing the United States, or he is bringing a federal claim. As demonstrated above, there exist very few cases that contemplate a state cause of action regarding state militia employees. Even fewer state civil rights claims are under sovereign immunity situations.

This split among the various states on this crucial constitutional question of federal law needs to be settled by this Court.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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claims, but not state claims; in both C.J. v. Vuinovich, 599 A.2d 548 (N.J. 1991), and Hazelton v. State Personnel Comm., 505 N.W.2d 793 (Wis. Ct. App. 1993), the state courts dismissed Plaintiffs' state claims due to controlling federal regulation mandating dismissal of Guardsmen with AIDS.

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RENDERED: NOVEMBER 21, 2002
TO BE PUBLISHED

Supreme Court of Kentucky

2001-SC-0761-MR

ROBERT A . JONES; CYNTHIA
WHITE ; LARRY WHITE; AND
REGINALD P . YOUNGBLOOD
(REAL PARTIES IN INTEREST)
APPELLANTS

ON APPEAL FROM COURT OF APPEALS

V . 2001-CA-0889-OA

FRANKLIN CIRCUIT COURT NOS.
99-CI-00311, 99-CI-00954, 99-CI-00956,
AND 99-CI-01093

HON. ROGER L . CRITTENDEN, JUDGE,
FRANKLIN CIRCUIT COURT;
KENTUCKY DEPARTMENT OF
MILITARY AFFAIRS; AND
KENTUCKY NATIONAL GUARD
APPELLEES

OPINION OF THE COURT BY JUSTICE GRAVES
AFFIRMING

Appellants/Real Parties in Interest, Robert A. Jones, Cynthia White, Larry White, and Reginald Youngblood, are current or former members of the

Kentucky National Guard, who have brought claims for discrimination and retaliation pursuant to the Kentucky Civil Rights Act, Ky. Rev. Stat . (KRS) 344 .010, et seq. The Kentucky National Guard and Kentucky Department of Military Affairs moved the Franklin Circuit Court for summary judgment, arguing that the actions raise a federal constitutional question which is preempted from state regulation and is not justiciable or reviewable in a civilian court by virtue of the Supremacy Clause and the Militia Clause of the United States Constitution. The circuit court denied the motion.

The Kentucky Department of Military Affairs and Kentucky National Guard filed a petition for writ of prohibition or mandamus pursuant to CR 76.36 requesting that the Court of Appeals direct the trial judge, Honorable Roger L. Crittenden, "to refrain from compelling petitioners to stand trial" and to direct him to dismiss the claims. The Court of Appeals granted the writ. We affirm the decision of the Court of Appeals .

II. THE NATIONAL GUARD IS AN INTEGRAL PART OF THE FEDERAL SYSTEM

The National Guard has a unique status in our federal system and a vital role in our national defense. The militia, which is the military forebear of the National Guard, is expressly provided for in the Constitution: "A well regulated Militia . . . [is] necessary to the security of a free State . . . . "[1] Each

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[1] U.S. Const. amend. II. The second amendment provides in full: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

state is thus empowered to maintain a militia and each state in fact maintains a militia, the modern equivalent of which is the National Guard.[2] Control of the Guard is reserved to the states, except when the Guard is called into federal service, at which time the Guard becomes subject to exclusive federal control.[3]

Congress first provided for the integration of militia and federal military forces in the National Defense Act of 1916, which made the National Guard part of the Regular Army.[4] Under the 1916 Act, all members of the National Guard were required to take oaths to obey both the President and the governors of their states.[5]

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[2] Maryland v. United States , 381 U .S. 41, 46-47, 85 S .Ct. 1293, 1297, 14L.Ed .2d 205 (1965), vacated on other grounds, 382 U .S . 159 (1965).

[3] "The President shall be Commander in Chief of the . . . Militia of the several States when called into actual Service of the United States . . . . " U.S. Const., art. II, § 2. Congress is tasked with "governing such Part of [[the militia] as may be employed in the Service of the United States." Id., art. I, § 8, cl. 16. Congress is authorized to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." Id., art. I, § 8, cl. 15.

[4] U.S. Const., art. I, § 8, cl . 15 ; see also Johnson v. Powell , 414 F.2d 1060, 1063 (5th Cir. 1969).

[5] Dukakis v. Department of Defense, 686 F. Supp. 30, 34 (D. Mass. 1988), aff'd, 859 F.2d 1066 (1st Cir. 1988), cert. denied, 490 U.S. 1020 (1989).

In 1933, Congress made the National Guard a permanent part of the federal military by creating a "dual-enlistment" system:

> It did this by conferring a new status on the Guard, by constituting it a reserve component of the Army, to be known as the National Guard of the United States . In its militia capacity, the National Guard was organized and administered under the militia clause of the Constitution, and available only for limited duties. . . . [I]n its capacity as a reserve component of the Army, [the National Guard] was organized and was to be administered under the army clause.[6]

As a result of having constitutional moorings in both the Militia Clause and the Armies Clause, the Guard's role in our federal system is uniquely dualistic:

> This role does not fit neatly within the scope of either state or national concerns; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.[7]

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[6] Weiner, "The Militia Clause of the Constitution," 54 Harv. L . Rev. 181, 208 (1940).

[7] Johnson v. Orr, 780 F.2d 386, 388 (3d Cir. 1986) (quoting New Jersey Air National Guard v. Fed. Labor Rel. Auth., 677 F.2d 276, 278-79 (3d Cir. 1982)).

Accordingly, the National Guard has today a dual status, and every Guardsman is a reservist in the United States Uniformed Services as well as a militiaman.[8]

In 1970, the National Guard was incorporated into the Total Forces Concept, which determines the total number of military personnel needed for our national defense and military commitments.[9] Thus, the Guard plays a vital role in the nation's military readiness program.

Due to the Guard's vital role in the Total Forces Concept, the Federal Government must ensure the Guard maintains a constant state of military readiness. To this end, the Constitution empowers Congress to provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress.[10] Pursuant to this authority, Congress has enacted legislation for equipping, training, and disciplining state Guard units so that Guardsmen are "an integral part of the first line defenses of the United States."[11] Congress

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[8] Dukakis, supra.

[9] See Bruton v. Schnipke, 370 F. Supp. 1157, 1163 (E.D. Mich. 1974).

[10] U.S. Const., art. I, 8, cl. 16.

[11] 32 U.S.C. 102 (1982). Congress has provided that Guardsmen's training and discipline must conform to that of their federal counterparts, see 32 U.S.C. § 501 (1982), and that Guardsmen are subject to the Uniform Code of Military Justice. See id. §§ 326-333. Additionally, Congress

also has created the National Guard Bureau, an adjunct of the Departments of the Army and the Air Force, to oversee state Guard units and to ensure compliance with federal statutory and regulatory requirements regarding military training, discipline, and readiness.[12] State Guard units that fail to comply are subject to forfeitures of federal funds and benefits.[13] Thus, the National Guard stands ready to provide "trained units and qualified persons . . . for active duty in the armed forces, in the time of war or national emergency and at such other times as the national security requires."[14]

III. NONJUSTICIABILITY

As early as 1953, the Supreme Court determined that "[t]he military constitutes specialized community governed by a separate

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has authorized the President to issue regulations and orders necessary to organize, discipline, and govern the National Guard. See id. §110. See also 10 § U.S.C. 105 (1982) (authorizing inspections of National Guards by Secretary of the Army and Secretary of the Air Force to ensure Guard units are properly organized, uniformed, armed, equipped, trained, and instructed).

[12] 10 U.S.C. § 3040 (1982).

[13] Section 108 of Title 32 provides: If, within a time to be fixed by the President, a state does not comply with or enforce a requirement of, or regulation prescribed under, this Title its National Guard is barred, wholly or partly as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law. 32 U.S.C. 108 (1982).

[14] 10 U.S.C. § 262 (1982).

discipline from that of the civilian."[15] Since that time, in reviewing issues which deal with the armed forces, the Supreme Court has regularly referred to the military as a "separate community" and reviewed claims against the military differently from claims against any other governmental agency. Restrictions on constitutional rights which might have no rational basis in civilian society will survive in the military context because the unique war-making purpose of the armed forces makes such restrictions compelling.[16] This attitude regarding constitutional rights is based upon the need to maintain an effectively operational fighting force.[17] The distinct purpose of the armed forces is to protect the United States, and its interests, against the actions of foreign nation- states, through the use of force.[18] It is because

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[15] Orloff v . Willoughby, 345 U.S. 83, 94, 73 S.Ct. 534, 540, 97 L.Ed 842 (1953).

[16] See Chappell v. Wallace , 462 U.S. 296, 300, 103 S.Ct. 2362, 2365-66, 76 L.Ed. 2d 586 (1983) ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting .... [C]enturies of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns." Id.).

[17] Parker v. Levy, 417 U.S. 733, 94 S .Ct. 2547, 41 L.Ed.2d 439 (1974) (the military effectively prohibited a member from criticizing the American role in the Vietnam War).

[18] In United States ex rel. Toth v. Quarles, the Supreme Court said that the primary business of the military is "to fight or be ready to fight wars should the

of this unique purpose that the military demands a respect for duty and a commitment to discipline that is without counterpart in civilian society.[19] Military effectiveness in wartime, however, requires peacetime preparation. In order for soldiers, airmen and seamen to utilize those qualities necessary for success on the battlefield, with all its stress and anxiety, those qualities must be instinctive. Success in war is therefore contingent upon the development of those qualities in peacetime. The Supreme Court has stated that, "to accomplish its mission the military must foster instinctive obedience, unity, commitment and esprit de corps."[20]

This creates a "necessity," which the Supreme Court has recognized, for training and organizational latitude when dealing with military personnel and the military infrastructure. "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields ; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection . . . . [C]onduct in combat inevitably reflects the training that precedes combat."[21]

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occasion arise." 350 U.S. 11, 17, 76 S.Ct. 1, 5, 100 L.Ed . 8 (1955).

[19] Schlesinaer v. Councilman, 420 U.S. 738, 757, 95 S.Ct. 1300, 1313, 43 L.Ed.2d 591 (1975).

[20] Goldman v. Weinberger, 475 U.S . 503, 507, 106 S .Ct. 1310, 1313, 89 L.Ed .2d 478 (1986) ; see also Chappell, supra; Greer v. Spock, 424 U.S. 828, 843-44, 96 S.Ct. 211, 1220, 47 L.Ed.2d 505 (1976) (Powell, J., concurring).

[21] Chappell, supra, 462 U.S. at 300, 103 S.Ct. at 2366 (citations omitted) ; see also Goldman, 475 U.S. at 508, 106

> The Supreme Court has long recognized that:
>
> [T]he military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that 'it is the primary business of the armies and navies to fight or be ready to fight wars should the occasion arise.[22]

A soldier in the Army is not free to quit his job, cannot be fired, and is subject to military discipline and military law.

The climate of "discipline and unquestioned obedience" necessary to sustain an effective fighting force is determined primarily by the professional judgments and experience of people familiar with military needs, and the Court has determined itself incapable of mastering the complexities which are considered when balancing constitutional rights against military functional necessity.[23] In Chappell, the United States Supreme Court stated that "the special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel. The most obvious

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S.Ct. at 1313 ("the necessary habits of discipline and unity must be developed in advance of trouble.").

[22] Parker, supra , 417 U.S. at 743, 94 S.Ct. at 2555-56 (quoting Quarles, supra, 350 U.S. at 17; 76 S.Ct. at 5).

[23] James M. Hirschorn, The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C.L. Rev. 177, note 4, at 203 (1984).

reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'"[24]

It would be imprudent to allow soldiers to sue superior officers because discipline and effectiveness would be seriously damaged. Permitting judicial intervention into such clearly administrative and personnel decisions would destroy the legitimacy and authority of command.[25]

Power to regulate the militia was conferred by the Constitution, not on the courts, but upon Congress and the President. Judges are not given the task of running the Army. The responsibility for creating channels through which such grievances can be considered and fairly resolved rests upon the Congress and upon the President of the United States and his subordinates. "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[26]

As stated in Parker v. Levy, supra:

> The armed forces depend upon a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the

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[24] 462 U.S. 305, 103 S.Ct. at 2368 (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 187 (1962).

[25] Problems or complaints which arise under such circumstances have been provided for by Congress in 10 U.S.C. §938, Art. 138 of U.C.M.J.

[26] Orloff, supra, 345 U.S. at 94, 73 S.Ct. at 540.

> Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command . If it does, it is constitutionally unprotected.[27]

IV. CONSTITUTIONAL LIMITATION

The Constitution of the United States, Article VI, provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof[,] . . . shall be the supreme Law of the Land ; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Constitution of the United States, Article I, Section 8, clause 16, gives Congress the power:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

The Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to maintain and regulate the "Militia." However, Section 221 includes the following directions: "The organization, equipment and discipline of the militia shall conform as nearly as practicable to the regulations for the government of the armies of the United States."

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[27] 417 U.S. at 759, 94 S.Ct. at 2563 (citations omitted.).

In Perpich v. Dep't of Defense[28], the United States Supreme Court defined the status of a state National Guard:

> Since 1933, all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States.
>
> . . .
>
> In a sense all of them now must keep three hats in their closets – a civilian hat, a state militia hat, and an army hat - only one of which is worn at any particular time. When the state militia hat is being worn, 'drilling and other exercises' . . . are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress.'
>
> . . .
>
> [The Militia Clause] merely recognizes the supremacy of federal power in the area of military affairs.
>
> . . .
>
> [T]he constitutional allocation of powers in this realm [gives] rise to a presumption that federal control over the Armed Forces [is] exclusive.[29]

In Feres v. United States,[30] service members sustained injuries in the course of military service

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[28] 496 U.S. 334, 110 S.Ct. 2418, 110 L.Ed.2d 312 (1990).

[29] Id. at 345-353, 110 S.Ct. at 2425-2429.

[30] 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950).

due to the negligence of other service members. The United States

Supreme Court held that the government is not liable for injuries to servicemen where the injuries "arise out of or are in the course of activity incident to service.[31] Citing to United States v . Standard Oil Co.,[32] the Feres Court stated:

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequence of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.[33]

The Feres Court pointed out that no American law had ever permitted a soldier to recover for negligence either against his superior officers or the Government he was serving, and declined to impute to Congress such a radical departure from established law in the absence of express Congressional mandates.[34] Feres not only bars intra military damage actions but also protects the integrity of the command relationship by avoiding judicial intrusion into the military structure absent an explicit congressional mandate.

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[31] Id. at 146, 71 S.Ct. at 159.

[32] 332 U.S. 301, 305-306, 67 S.Ct. 1604, 1607, 91 L.Ed. 2067 (1947).

[33] Feres, supra, 340 U.S. at 143-144, 71 S.Ct. at 159.

[34] Id. at 141-142, 71 S.Ct. at 157.

In addressing this same issue, the Sixth Circuit Court of Appeals stated:

> Consistent with the reasoning in Chappell, courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so . Thus, uniformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964.[35]

Although Congress has not enacted statutes expressly preempting state regulation of discrimination suits against military authorities, the federal scheme described above strongly suggests that the field has been impliedly preempted by federal law. Additional support for this conclusion is found in the long line of United States Supreme Court cases beginning with Feres and continuing with its progeny on a consistent pattern of expansion of the Feres doctrine. Language authored by the Sixth Circuit emphasizes this point:

> Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-

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[35] Coffman v. State of Michigan, 120 F.3d 57, 59 (6th Cir. 1997).

producing event and the essential defense/combat purpose of the military activity from which it arose.[36]

The unique and delicate relationship between uniformed personnel and their superiors would be negatively affected if civilian courts, federal or state, were empowered with the jurisdiction to adjudicate discrimination claims brought by servicemen, which would necessarily involve testimony by the officers accused of misconduct and would require the court to analyze military decisions taken with regard to the controversy. As decided in Chappell, supra, civilian courts are "ill-equipped" to evaluate the impact of such actions nonmilitary discipline and "must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessary unique structure of the military establishment."[37]

We doubt that Congress wanted such a scenario. Moreover, the real parties in interest do have a remedy by availing themselves of the provisions of the National Guard Military Discrimination Complaint System.

The Supreme Court's rationale in Feres, supra, and its progeny proscribe suits based on civil rights statutes. The Feres doctrine generally bars soldiers' suits for service-related injuries absent an

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[36] Major v. United States, 835 F.2d 641, 644 (6th Cir. 1987).

[37] Chappell, 462 U.S. at 300, 103 S.Ct. at 2366.

express congressional command to the contrary. The Feres doctrine stems not only from practical considerations regarding the deleterious impact of judicial interference on the command relationship. The doctrine stems as well from consideration of constitutional significance because the Constitution vests Congress and the President, not the judiciary, with plenary Constitutional authority over the military. The Kentucky National Guard is an integral component of the United States Uniform Services. Consequently, we hold that claims brought by Kentucky National Guardsmen pursuant to KRS Chapter 344 for injuries while in military service are not justiciable because Congress has not expressly permitted such suits.

We affirm the decision of the Court of Appeals.

Lambert, C.J., Cooper, Graves, and Wintersheimer, J.J. concur.

Johnstone, J., dissents in a separate opinion in which Stumbo, J., joins.

Keller, J., dissents in a separate opinion.

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Supreme Court of Kentucky

2001-SC-0761-MR

ROBERT A. JONES; CYNTHIA A . WHITE ; LARRY WHITE; AND REGINALD P. YOUNGBLOOD (REAL PARTIES IN INTEREST)
APPELLANTS

ON APPEAL FROM COURT OF APPEALS

V. 2001-CA-0889-OA

FRANKLIN CIRCUIT COURT NOS. 99-CI-00311, 99-CI-00954, 99-CI-00956 AND 99-CI-01093

HON. ROGER L. CRITTENDEN, JUDGE, FRANKLIN CIRCUIT COURT; KENTUCKY DEPARTMENT OF MILITARY AFFAIRS ; AND KENTUCKY NATIONAL GUARD
APPELLEES

DISSENTING OPINION BY JUSTICE JOHNSTONE

I respectfully dissent . While the majority fashions an eloquent argument in support of its position, that argument merely attempts to evade the

democratic and unambiguous purpose of the Kentucky Civil Rights Act, which is "[t]o safeguard all individuals within the state from discrimination ." KRS 344 .020 (emphasis added) . The majority's judicial machinations aside, there is no exception to the Civil Rights Act for the Kentucky National Guard or the Kentucky Department of Military Affairs.

The Appellants in this case were undeniably serving the Commonwealth at the time of the alleged events . As the majority correctly notes, "[t]he Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to maintain and regulate the 'Militia .'" Slip op. at 9. Moreover, the Governor is the Commander-In-Chief of the militia, except when it is called into the service of the United States. Ky. Constitution § 75. And significantly, Kentucky Guardsmen are in the service of the Commonwealth "unless and until ordered to active duty." Perpich v. Dept. of Defense, 496 U.S. 334, 345; 110 S . Ct. 2418, 2425; 110 L. Ed. 2d 312, 325 (1990). Only when "that triggering event occurs does a Guardsman become a part of the Army and lose his status as a state serviceman." Gilbert v. United States, 165 F.3d 470, 473 (6th Cir.1999) (quoting United States v. Hutchings, 127 F.3d 1255, 1258 (10th Cir. 1997) . The fact that the Kentucky National Guard receives federal funds does not alter the status of the Guardsmen : "the issue of status depends on command and control and not on whether . . . state or federal funds are being used. . . . " Gilbert at 473. In this case, none of the plaintiffs had been called to active duty, so they were still under the state's control.

The Kentucky Civil Rights Act provides that any person who has been injured under the Act "shall have a civil cause of action in Circuit Court." KRS 344 .450. And the state is not above suit for violation of the Act. In Dept. of Corrections v. Furr, Ky., 23 S.W .3d 615, 617 (2000), this Court held that the state has waived sovereign immunity for claims under KRS 344:

> What hollow words indeed if the safeguard against discrimination does not include the right to be free from acts of discrimination committed by the Commonwealth itself, or in its name.
>
> . . . .
>
> To immunize the Commonwealth from the application of the Kentucky Civil Rights Act frustrates the act's purpose and intent, deprives many of its citizens of its protection, and renders meaningless its pledge to safeguard all individuals from discrimination.

(Emphasis in original). These facts led the Franklin Circuit Court in this case to properly conclude: "[W]hile the Plaintiffs were under the exclusive command of the Kentucky National Guard, the laws of the Commonwealth of Kentucky applied. . . .[And] the Kentucky National Guard, while under state control, must abide by the provisions set forth in KRS 344."

The majority claims that Appellants' suits against the Kentucky National Guard and the Kentucky Department of Military Affairs are nonjusticiable because "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian." Slip op . at 5

(quoting Orloff v. Willoughby, 345 U.S. 83, 94, 73 S. Ct. 534, 540, 97 L. Ed. 842, 849 1953)). In fact, "discipline" is a motif running throughout the majority opinion: some form of the word is used no less than nineteen (19) times. With such heavy reliance on the term, it makes sense to have a clear understanding of its meaning. The majority seems to ascribe at least three (3) different meanings to "discipline." In quote above, from Orloff, "discipline" refers to a formal grievance procedure or judicial protocol. Examples of discipline in this sense include the Uniform Code of Military Justice (see Chappell v. Wallace, 462 U.S. 296, 302, 103S. Ct. 2362, 76 L. Ed. 2d 586, 592 (1983)), the Board for Correction Naval Records (see id.), and the National Guard Complaint System (see slip op. at 12). The word "discipline" also denotes a state of preparation or fitness. E.g., "It is because of this unique purpose that the military demands a respect for duty and a commitment to discipline that is without counterpart in civilian society." See slip op. at 6. The third use of the word "discipline" is in the context of punishment. E.g., "A soldier in the Army is not free to quit his job, cannot be fired, and is subject to military discipline and military law." See slip op. at 7.

But all of this discussion about discipline just diverts attention from the facts of the present case. The complainants in this case did not file suit based on a disciplinary matter, they claimed they were discriminated against. Failing to promote a Guardsman because of race, transferring a Guardsman because of race, or calling a Guardsman "nigger" or "black bitch," if true, is not "discipline" of the type the majority claims is "prescribed by Congress." Nor is it any other form of "discipline"

that could be properly sanctioned, either by the military or any other institution. And it certainly is not the type of protected military action that is, according to the majority, designed to "foster instinctive obedience, unity, commitment and esprit de corps." Slip op. at 6 (quoting Goldman v. Weinberger, 475 U.S . 503, 507, 106 S. Ct. 1310, 1313, 89 L. Ed. 2d 478, 484 (1986)). Such treatment demonstrates unabashed racial bigotry.

But if there is a military or nondiscriminatory reason to support the treatment these Guardsmen received, I do not believe it is beyond the comprehension of a civilian to grasp. As Justice Oliver Wendell Holmes famously observed in a slightly different context but with equal effect here: "Even a dog knows the difference between being kicked and being tripped over." And to address the majority's fears of a complete breakdown of military "discipline" if civil rights suits against the Guard are brought in civilian court, I offer Justice Scalia's dissenting remarks in United States v. Johnson: "I do not think the [adverse] effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding . . . that [the Legislature] did not mean what it plainly said in the statute before us." Johnson, 481 U.S. 681, 699, 107 S. Ct 2063, 2073, 95 L. Ed. 2d 648, 664, (1987) (Federal Tort Claims Act case involving a serviceman negligently killed while on duty. Three Justices joined Justice Scalia's dissenting opinion, which eviscerated Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950)). Racial discrimination is a vile vestige from a bygone era in the history of our nation and our state . Permitting the Kentucky National Guard to continue to evade responsibility for its discriminatory acts - if it

committed those acts - simply because it is a military body, will only make this Court an accomplice in entrenching that institution on the wrong side of history. And all individuals in our Commonwealth will be worse off for it.

The majority also claims that the Supremacy Clause bars Appellants' claims: "Although Congress has not enacted statutes expressly preempting state regulation of discrimination suits against military authorities, the federal scheme described above strongly suggests that the field has been impliedly preempted by federal law." Slip op. at 11. Not only does the majority's argument rely heavily on Feres, supra, an opinion whose inherent shortcomings were pointed out in Johnson, supra, but the argument also misapprehends federal constitutional law. The majority is correct that the Militia Clause clearly gives Congress power over military affairs and specifically power over disciplining the militia . But these premises ignore the facts established above; namely, that Appellants do not complain about matters of "discipline" - they decry alleged acts of blatant discrimination - and when the Kentucky National Guard has not been called into active service, it remains under the regulation of the Kentucky Legislature.

Preemption can occur in three ways : (1) Congress expressly intends to preempt a state law; (2) Congress "occupies the field" of regulation; or (3) compliance with both federal and state regulations is a physical impossibility. Gustafson v. City of Lake Angelus, 76 F.3d 778, 782-83 (6th Cir. 1996). Congressional intent is the focus of a preemption inquiry. Id. at 783. The majority concedes that

nothing in the Militia Clause, or any subsequent federal regulation, expressly prevents state legislatures from extending civil rights coverage to state Guards. And though courts may hold that Congress exempted the federal military from Title VII civil rights claims, that limitation is a far cry from implied preemption preventing states from extending those rights to state Guards. In the absence of a conflict, States are permitted to extend their citizens protections greater than federal law provides . The Kentucky Legislature has done just that with KRS 344, a fact we recognized in Meyers v. Chapman Printing, Ky., 840 S.W.2d 814, 817 (1992):

> One important purpose of the Kentucky Civil Rights Act was to incorporate the anti-discrimination "policies embodied" in the Federal Civil Rights Acts of 1964 (P.L. 88-352, Title VII--Equal Employment Opportunity) as amended. . . . But there are further purposes expressed in the Kentucky statute not specified in the Federal, including "protect[ing] . . . personal dignity and freedom from humiliation." Whereas the policies embodied in the Kentucky Act are the same as the federal counterpart, the statutory remedy provided through the court system differs markedly because of these further policy statements and because of the difference in remedy provided in KRS 344.450 as contrasted with those provided in the Federal Act . . . .

(Internal citations omitted, emphasis added). KRS 344 was modeled after Title VII, both statutes are designed to protect civil rights, and they do so in the

same manner. There simply is no conflict between the state and the federal laws, and the fact that KRS 344 extends greater protections than Title VII does not create such a conflict. KRS 344 plainly says that any individual who has been harmed under the Act may bring suit in Circuit Court . There is no exemption for the Kentucky National Guard. The limitations that apply in federal settings do not likewise apply to state matters. Even the Supreme Court in Chappell, supra, conceded that some civil rights violations in the military might properly be brought in civilian courts: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service ." Chappell, 462 U.S. at 304, 103 S. Ct. at 2368, 76 L. Ed. 2d at 594 (1983).

Despite the majority's attempt to cloak the Kentucky Department of Military Affairs and Kentucky National Guard in the armor of federal protection, that organization remains subject to the provisions of KRS 344 and is not entitled to summary judgment in this case . As a circuit judge, I presided over a factually similar case in Moore v. Kentucky Department of Military Affairs and Army National Guard, 92-CI-06861 (unpublished). In denying the defendant's motion to dismiss in Moore, I reached the same result then as I do today:

> KRS 344.040 makes it unlawful for an employer to discriminate against an individual on the basis of race or sex, as well as other classes. KRS 344.030 defines "employer" as "a person who has eight (8) or more employees within the state in each of

> twenty (20) or more calendar weeks in the current or preceding calendar year . . . . 11 And KRS 344.010(1) defines "person" to include "the state, any of its political or civil subdivisions or agencies."
>
> The Department of Military Affairs, Army National Guard is attached to the office of the governor. KRS 36.010(5). As such, it falls within the definitions and provisions of KRS Chapter 344, and specifically KRS 344.010(1). Consequently, the Guard is subject to suit under KRS Chapter 344, and this Court does have subject matter jurisdiction . . . .

Moore, Order Denying Motion to Dismiss at 3-4 (January 12, 1993). Though a decade has passed since Moore, I steadfastly believe that this disposition alone faithfully complies with both the letter and spirit of the law.

Stumbo, J., joins this dissenting opinion.

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Supreme Court of Kentucky

2001-SC-0761-MR

ROBERT A . JONES; CYNTHIA
WHITE; LARRY WHITE ; AND
REGINALD P . YOUNGBLOOD
(REAL PARTIES IN INTEREST)
APPELLANTS

ON APPEAL FROM COURT OF APPEALS

V. 2001-CA-0889-OA

FRANKLIN CIRCUIT COURT NOS .
99-CI-00311, 99-CI-00954, 99-CI-00956 AND 99-CI-
01093

HON . ROGER L . CRITTENDEN, JUDGE,
FRANKLIN CIRCUIT COURT;
KENTUCKY DEPARTMENT OF
MILITARY AFFAIRS ; AND
KENTUCKY NATIONAL GUARD
APPELLEES

DISSENTING OPINION BY JUSTICE KELLER

I respectfully dissent. When this Court decided Department of Corrections v. Furr ("Furr"),[38] I joined Justice Cooper's dissenting opinion[39] because I believed then -- and I believe now -- that agencies of the Commonwealth cannot be sued for money damages in Circuit Court under the Kentucky Civil Rights Act because the General Assembly has not "specifically and expressly" waived their immunity. I recognize, however, that a majority of this Court concluded otherwise and held that "KRS 344 .450 provides a cause of action against the Commonwealth for violations of the Kentucky Civil Rights Act."[40] Accordingly, although I would vote to overrule Furr if three other members of this Court would join me, I recognize that the lawsuit that is the subject of this appeal sprung forth from Furr, and thus, in order to resolve the issues presented here, I must temporarily set aside my views and apply the Court's precedent. After doing so, I believe the Court of Appeals erred when it granted the extraordinary relief requested by the Appellees. In fact, I do not believe it is necessary to reach the merits of this action because the Appellees' failure to demonstrate the inadequacy of post-trial appellate review is, standing alone, fatal to their CR 76.36 request for a writ of prohibition or mandamus.[41] However, because both the majority opinion and Justice Johnstone's separate dissenting opinion reach this

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[38] Ky., 23 S .W.3d 615 (2000).

[39] Id. at 618-619 (Cooper, J., dissenting).

[40] 1d. at 618.

[41] 'See Kentucky Labor Cabinet v. Graham, Ky., 43 S.W.3d 247, 251 (2001).

case's merits, I state my agreement-- subject to the caveat above -- with the Furr author's (Justice Johnstone's) dissenting opinion. Accordingly, 1 would reverse and remand for the Court of Appeals to enter an order denying relief.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 2001-CA-000889-0A

KKENTUCKY DEPARTMENT OF MILITARY AFFAIRS AND KENTUCKY NATIONAL GUARD — **PETITIONERS**

vs. **ORIGINAL ACTION REGARDING FRANKLIN CIRCUIT COURT ACTION NOS. 99-CI-00311, 99-CI-00954, 99-CI-00956, and 99-CI-01093**

HON. ROGER L. CRITTENDEN, JUDGE, FRANKLIN CIRCUIT COURT — **RESPONDENT**

AND

ROBERT A. JONES, CYNTHIA WHITE, LARRY WHITE, AND REGINALD P. YOUNGBLOOD — **REAL PARTIES IN INTEREST**

****

OPINION AND ORDER GRANTING CR 76.36 RELIEF

BEFORE: BUCKINGHAM, GUIDUGLI AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE. Petitioners, Kentucky Department of Military Affairs and Kentucky National Guard, have filed a petition for writ of prohibition or mandamus pursuant to Ky. R. Civ. P.(CR) 76.36. Petitioners request that this Court direct the respondent trial judge, Honorable Roger L. Crittenden, "to refrain from compelling petitioners to stand trial on the discrimination and retaliation claims against them" and to direct him to dismiss those claims. The real parties in interest, Robert A. Jones, Cynthia White, Larry White, and Reginald Youngblood, have responded to this petition.

Petitioners are defendants below to four consolidated actions brought against them by the real parties in interest, who are current or former members of the Kentucky National Guard, pursuant to the Kentucky Civil Rights Act, Ky. Rev. Stat. (KRS) 344.010, et seq. Petitioners moved the circuit court for summary judgment, arguing that the actions raise a federal constitutional question which is preempted from state regulation and is not justiciable in a civilian court by virtue of application of the Supremacy Clause and the Militia Clause of the United States Constitution. Franklin Circuit Court denied the motion.

Hence, this original action, which claims that the circuit court is acting without jurisdiction and that petitioners are entitled to dismissal based on, among other grounds, two decisions issued by the U.S. Supreme Court, i.e., Feres v. United States, 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152 (1950) (where the

Supreme Court held that the federal government is not liable under the Federal Tort Claims Act for servicemen's injuries arising from activities incident to military duty), and Chappell v. Wallace, 462 U.S. 296, 103 S. Ct. 2362, 76 L. Ed. 2d 586 (1983) (where the Supreme Court held that military personnel may not maintain civil actions against their superior officers for alleged constitutional violations). In this original action, petitioners allege that they would suffer irreparable injury from which they have no adequate remedy by appeal were the actions allowed to proceed because they would "forever lose or forfeit some of the protections of the Feres-Chappell doctrine, namely, the right not to stand trial before a civilian court and have a civilian jury second-guess the decisions of respondents' military superiors."

In its decision denying petitioners' motion for summary judgment, the trial court stated the issue before it was one of first impression in Kentucky. First, it determined that there is nothing in KRS Chapter 344 that would exclude petitioners from its provisions. It then went on to distinguish this case from Feres on the basis that, in the latter, the acts complained of were negligent, not intentional. The court noted that different tests have been applied by various jurisdictions to decide the justiciability of military-related actions filed in civil courts and that the Sixth Circuit has adopted the "per se test", i.e., whether the challenged activity is incident to military service. The circuit court relied on Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999), a case which declines to apply the provisions of the Posse Comitatus Act to members of the Kentucky National Guard on the basis that the guardsmen remained within state command when they engaged in the

activities at issue therein. The circuit court also found helpful a decision written by then Circuit Judge Martin Johnstone finding that the National Guard was subject to suit under KRS Chapter 344. Therefore, the court concluded, it had subject matter jurisdiction to adjudicate the actions pending before it.

In this original action, petitioners contend that federal regulations make it clear that the federal anti-discrimination laws do not apply to National Guard personnel and, therefore, that "it should be evident that Congress does not want KRS 344 to apply to the National Guard." They argue that, regardless of the test they have used, all jurisdictions, including the Sixth Circuit, which have reviewed the matter as it pertains to discrimination claims between enlisted personnel and their employer or superior officer have decided that federal law has preempted this field from state regulation, thereby placing this type of claim outside the ambit and jurisdiction of civilian courts. Consequently, they argue that "[t]o the extent that the General Assembly arguably intended to include the Kentucky National Guard as an employer subject to the discrimination provisions of KRS Chapter 344, the General Assembly has exceeded its authority and this legislation is void pursuant to the Supremacy Clause and the Militia Clause of the United States Constitution."

In response, the real parties in interest contend that their claims have not been preempted by federal law because, as members of the Kentucky National Guard, they remain state officers until called into federal service. Perpich v. Department of Defense, 496 U.S. 334, 110 L. Ed. 2d 312, 110 S. Ct. 2418 (1990). They also rely on Gilbert, supra, for the

proposition that the status of a guardsman is based upon which entity exercises control over the individual when the alleged injuries occurred. They reject petitioners' reliance on Feres and on Chappell because they contend these cases may be distinguished from the specific matter at issue in this case, which has yet to be addressed by the U.S. Supreme Court. They argue that the provisions of KRS Chapter 344 are neither preempted by the Supremacy Clause, nor the Militia Clause, because the state statutory scheme does not conflict with federal law and because the discrimination claimed by them has nothing to do with military discipline.

A writ of prohibition or mandamus is an extraordinary and discretionary remedy. Generally, in a case where a petitioner seeks relief on the ground that the trial court is proceeding, or about to proceed, outside its jurisdiction, the petitioner is required to make a preliminary showing that it has no adequate remedy by appeal. See, e.g., Shumaker v. Paxton, Ky., 613 S.W.2d 130 (1981). However, remedy by appeal is not always the controlling consideration as ". . . it would be a most inept ruling to deny the writ, require a trial on the merits, and then on an appeal be forced to reverse the case on the very question which is now before us." Chamblee v. Rose, Ky., 249 S.W.2d 775, 777 (1952). In addition, although we recognize that the circuit court was exercising its discretion when it denied petitioners' motion, we have determined that the question presented to this court in this original action is one of law. Therefore, this court is not restricted to the abuse of discretion standard of review and may issue its opinion without deferring to the trial court. Southeastern United Medigroup, Inc. v. Hughes, Ky.,

952 S.W.2d 195, 199 (1997); Sisters of Charity Health Systems, Inc. v. Raikes, Ky., 984 S.W.2d 464 (1998).

Based on our application of the foregoing standard, and our review of the parties' arguments, the partial record, and the law cited to us, this petition is GRANTED and a writ of mandamus shall issue.

We begin our analysis by noting that, at first blush, the arguments made by the real parties in interest appear reasonable. Pursuant to KRS 36.010, the Kentucky Department of Military Affairs is "attached to Office of Governor," to whom it reports regarding "the proper functioning of the Kentucky National Guard, . . ." Pursuant to KRS 36.020-040, the executive head of the Department of Military Affairs is the adjutant general, an appointee of the Governor.

Further, pursuant to KRS 35.390, a guardsman "who believes himself wronged by his commanding officer, . . . may complain to any superior officer who shall forward the complaint to the Governor through the adjutant general;. . ." And, KRS 35.420 "presumes" the jurisdiction of military courts. Even petitioners recognize that these two statutes do not clearly show the full intent of the General Assembly as it pertains to the jurisdiction of civilian courts over guardsmen's discrimination grievances.

We also note that both the Kentucky Department of Military Affairs and the Kentucky National Guard are state agencies.[42] KRS 344.010(1) specifically includes within its provisions "the state,

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[42] In fact, the real parties in interest point out they are "enjoying the benefit" of representation by the Office of the Kentucky Attorney General in this action.

any of its political or civil subdivisions or agencies". See Department of Corrections v. Furr, Ky., 23 S.W.3d 615 (2000).

In addition, we have considered the argument made by the guardsmen that, while the federal preemption doctrine often applies to override state statutory provisions which conflict with federal law, or would frustrate the uniformity intended by the federal scheme, KRS Chapter 344 was modeled after federal law, i.e., Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e-16. See Palmer v. International Association of Machinists, Ky., 882 S.W.2d 117, 119 (1994). Further, we have taken note of their argument that "discriminatory acts cannot be condoned as discipline".[43]

As previously stated, those are arguments that initially appear well-taken. However, upon reaching the completion of our review of the authorities currently available in this complex and sensitive area of the law, we are compelled to

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[43] A similar point was made by a plaintiff in an action for sexual harassment brought against her superior officers in the United States Air Force. The plaintiff argued that the activities she was challenging "simply cannot be viewed as acceptable in any fashion [because they] do not implicate issues of judgment, discretion or command. . . ." In rejecting that argument, the reviewing court referred the plaintiff to the holding of United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985), and its emphasis on the "negative impact" such an action would have on military discipline. Mackey v. United States, 226 F.3d 773 (6th Cir. 2000). This case also clarifies that the Feres doctrine applies to claims of intentional torts, not merely to those of negligence.

conclude that the issue presented to us for determination must be analyzed within the confines of a different framework.

The Constitution of the United States, Article VI, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Constitution of the United States, Article I, Section 8, clause 16, gives Congress the power:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;...

The Constitution of Kentucky, Section 220, gives to the Kentucky Legislature the power to maintain and regulate the "Militia". However, Section 221 includes the following directions:

> The organization, equipment and discipline of the militia shall conform as nearly as practicable to the regulations for the

government of the armies of the United States.

Language set forth in Perpich, supra, well defines the status of a state National Guard. The following quoted excerpts are particularly instructive:

> Since 1933, all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States. Id., at 345.

> In a sense now, all of them now must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat -- only one of which is worn at any particular time. When the state militia hat is being worn, 'drilling and other exercises'... are performed pursuant to 'the Authority of training the Militia according to the discipline prescribed by Congress.' Id., at 348.

> [The Militia Clause] merely recognizes the supremacy of federal power in the area of military affairs. Id., at 351.

> ...[T]he constitutional allocation of powers in this realm [gives] rise to a presumption that federal control over the Armed Forces [is] exclusive. Id., at 353.

Also of significance is language found in Feres[44] and in Chappell, supra:

> To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons outside them or nonfederal governmental agencies, the scope, nature, legal incidents and consequence of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.
>
> This Court . . . cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. Feres, at 143-44.
>
> Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline . . . .' Chappell, at 299.

Likewise, we are guided by the holdings issued by the Sixth Circuit in the reported cases cited by petitioners. Recent language on the subject includes the following:

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[44] The Feres doctrine has been held to apply to suits brought by members of the National Guard. Stencel Aero Engineering Corp. v. United States, 431 U.S. 666, 97 S. Ct. 2054, 52 L. Ed. 2d 665 (1977).

> Consistent with the reasoning in Chappell, courts of appeals have consistently refused to extend statutory remedies available to civilians to uniformed members of the armed forces absent a clear direction from Congress to do so. Thus, uniformed members of the armed forces have no remedy under Title VII of the Civil Rights Act of 1964.
>
> Coffman v. State of Michigan, 120 F.3d 57, 59 (6th Cir. 1997).

Petitioners have provided the court with a copy of the National Guard Military Discrimination Complaint System, issued by the Departments of the Army and the Air Force. The regulation sets forth a uniform mechanism for the processing of guardsmen's discrimination claims and clearly applies to the real parties in interest. Further, it expressly provides that it implements Title VI of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000d, and not Title VII, codified in 42 U.S.C. § 2000e-16 from which KRS Chapter 344 was modeled.

While the respondent judge relied on Gilbert, supra, we have determined that this authority has no application to the controversy before us. The case merely decided that 18 U.S.C. § 1385 was not violated when Kentucky National Guardsmen participated in a search and seizure operation while under state, rather than federal, command. As made clear by the Militia Clause, and also exemplified in KRS Chapters 35 and 36, a variety of functions related to military affairs is solely within the jurisdiction of the particular state and its agencies. Gilbert clarifies the

point we are making regarding the control which the state may exercise over its military personnel when performing certain activities that have been defined as being within the realm of state regulation. However, Gilbert provides no guidance regarding the issue before us because it does not deal with "the effects of the maintenance of [discrimination] suits on discipline . . . ." Chappell, supra at 299.

It is our conclusion that, although Congress has not enacted statutes expressly preempting state regulation of discrimination suits against military authorities, the federal scheme referred to in this Opinion strongly suggests that the field has been impliedly preempted by federal law. Additional support for this conclusion is found in the long line of U.S. Supreme Court cases beginning with Feres and continuing with its progeny on a consistent pattern of expansion of the Feres doctrine.[45] We shall borrow language authored by the Sixth Circuit in order to emphasize this point:

> Review of these Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the Feres doctrine to encompass, at a minimum, all injuries suffered by military personnel that are even remotely related to the individual's status as a member of the military, without regard to the location of the

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[45] United States v. Shearer, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985); United States v. Johnson, 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648 (1987); United States v. Stanley, 483 U.S. 669, 107 S. Ct. 3054, 97 L. Ed. 2d 550 (1987).

> event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.
> Major v. United States, 835 F.2d 641, 644 (1987)

It is clear that the question is not whether discriminatory acts may or may not "be condoned as discipline". Rather, the question is whether the unique and delicate relationship between uniformed personnel and their superiors would be negatively affected if civilian courts, federal or state, were empowered with the jurisdiction to adjudicate discrimination claims brought by servicemen, which would necessarily involve testimony by the officers accused of misconduct and would require the court to analyze military decisions taken with regard to the controversy. As decided in Chappell, civilian courts are "ill-equipped" to evaluate the impact of such actions on military discipline and "must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers." Id., at 300. In addition, it seems obvious that the uniformity intended by Congress for the compensation of injuries incurred by those in the armed services would be greatly undermined were this determination left to be made by civilian courts, acting within their own separate and distinct spheres of empowerment and applying conceivably incompatible statutory and regulatory schemes. We are of the opinion that such a scenario

is not what Congress wants. While this might seem harsh, it must be remembered that the real parties in interest do have a remedy by availing themselves of the provisions of the National Guard Military Discrimination Complaint System, as discussed above.[46]

In accordance with the views expressed in this opinion and order, the respondent trial court is hereby DIRECTED to issue an order dismissing the actions filed by the real parties in interest for lack of subject matter jurisdiction.

HUDDLESTON, JUDGE, CONCURS.

GUIDUGLI, JUDGE, DISSENTS.

ENTERED: August 24, 2001

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JUDGE, COURT OF APPEALS

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[46] It is not clear whether the guardsmen in this case have formally initiated the administrative grievance process. The response asserts they "fully complied with the provisions of the Kentucky National Guard's internal complaint system. . . ." The petition states they "rejected [the process] in favor of seeking relief in Franklin Circuit Court."

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COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 99-CI-00311

ROBERT JONES, CYNTHIA WHITE,
LARRY WHITE,
REGINALD YOUNGBLOOD PLAINTIFFS

vs. OPINION AND ORDER

KENTUCKY DEPARTMENT
OF MILITARY AFFIARS, KENTUCKY
NATIONAL GUARD, and LIEUTENANT
COLONEL WILLIAM CLARK DEFENDANTS

* * * * * * * * * * * *

This matter is before the Court upon the Motion for Summary Judgment filed by the Defendants, the Kentucky Department of Military Affairs, the Kentucky National Guard, and Lieutenant Colonel William Clark. The Defendants assert, *inter alia*, that the claims of the Plaintiffs fail to state a cause of action for which relief may be granted, that there is insufficient evidence to support the claims, that the claims are non-justiciable, and that Lt. Colonel Clark should be dismissed from this suit in his individual capacity. This Court has reviewed the record, the arguments of the parties, and the applicable case law and now grants in part

and denies in part the Defendants' Motion for Summary Judgment.

FACTS

By order of this Court issued October 26, 1999, the above referenced cases were consolidated for purposes of discovery. Due to the similar nature of the claims, the Court will review the common questions of law raised by the motion for summary judgment before turning to any case-specific issues.

The pertinent facts are as follows. The plaintiffs each allege to have suffered from repeated instances of racial discrimination and harassment while serving in the Kentucky National Guard. Specifically, Reginald Youngblood and Larry White assert claims of racial discrimination, intentional infliction of emotional distress, and retaliation. Robert Jones complains of similar adverse action, charging racial discrimination, constructive discharge, retaliation, slander and intentional infliction of emotional distress. The final complainant, Cynthia White, alleges sexual discrimination in addition to racial discrimination and intentional infliction of emotional distress. Each of the above plaintiffs seek compensatory and punitive damages.

For the reasons set forth below, the Court now dismisses each plaintiff's claim of intentional infliction of emotional distress. The Court also dismisses Lt. Col. Clark in his individual capacity. The remaining claims are allowed to proceed.

JUDGMENT

Summary judgment is proper when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ky. R. Civ. Proc. 56.03. The standard for granting summary judgment is set forth in Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). In reaffirming the standard set forth in Paintsville Hospital Co. v. Rose, Ky., 683 S.W.2d 255 (1985), the Supreme Court said that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in [his/her] favor ..." Steelvest, 807 S.W.2d at 480. In considering whether to grant summary judgment, this Court must view the record in the light most favorable to the party opposing the motion for summary judgment and must resolve all doubts in his favor. Id.

The first determination for this Court is whether, as a matter of law, an individual may sue the Kentucky National Guard for alleged discriminatory behavior. The Defendants argue that civilian courts do not have the authority or jurisdiction to compel the military, which includes the Kentucky Department of Military Affairs and the Kentucky National Guard, to comply with the state's discrimination law enacted pursuant to KRS Chapter 344. The essence of this defense is that federal law has preempted this field from regulation by the states thereby rendering Kentucky's anti-discrimination laws inapplicable by virtue of the Supremacy Clause of the United States Constitution. This is an issue of

first impression for Kentucky state courts, however, other jurisdictions provide guidance in resolving the questions presented.

The first determination this Court must make is whether KRS 344 applies to the Department of Military Affairs and the National Guard. The expressed purpose of this statute is "[t]o safeguard all individuals within the state from discrimination." KRS 344.020(1)(b). Further, KRS 344.450 provides that "[a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in circuit court." Nothing in the statutory language excludes that National Guard or the Department of Military Affairs from the provisions of KRS 344. The Defendants, however, argue that a civil rights action brought in circuit court is non-justiciable, notwithstanding the lack of specific exclusionary language in the statute.

In support of this position, the Defendants cite extensive case law. See, e.g., Feres v. United States, 340 U.S. 135, 103 S.Ct. 2362, 76 L.Ed. 2d 586 (1950) (holding that the United States is generally immune from liability for matters that "arise out of or are incident to military service); Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed. 2d 586 (1983) (wherein the Court declined to hold that military personnel are barred from all redress in civilian courts for wrongs suffered in the course of military service, but warned that "[c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between military personnel and their superior officers ..." Id. at 462 U.S. 300.)

The various circuits are split as to the appropriate standard for determining the justiciability of military related suits in civilian courts. The Sixth Circuit has developed a "per se test" of whether the activity was "incident to military service." Under this analysis, "the result depends on the 'relevant links' between the Armed Forces and the service member's activity, requiring 'a measuring of the degree to which the activity is divorced from or related to military service.'" Woodside v. United States, 606 F.2d 134 (6th Cir. 1979) (citations omitted).

Other jurisdictions have applied different tests. See e.g., Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971); Khalsa v. Weinberger, 779 F.2d 1393 (9th Cir. 1986); Knutson v. Wisconsin National Guard, 995 F.2d 765 (7th Cir. 1993). Based upon the holdings of these cases and their progeny, the Defendants argue that the Plaintiffs' claims must be dismissed since discrimination laws, whether federal or state, are inapplicable to the National Guard. This Court disagrees.

As noted by the United States Supreme Court in Chappell v. Wallace, 462 U.S. 296, 304, "The Court has never held ... that military personnel are barred from all redress in civilian courts for constitutional wrongs in the course of military service." This Court notes that the Feres Doctrine, which serves as the foundation upon which the above referenced appellate cases are based, can be distinguished from the case at bar. In Feres, the issue was acts of negligence committed by the military. The acts which the Plaintiffs' allege in the instant matter, however, are intentional.

In addition to this distinction there are other justifications for allowing this suit to continue to trial. In Moore v. Kentucky Dept. of Military Affairs and Army National Guard, 92-CI-06861, a case factually similar to the one before the Court, Judge Martin Johnstone denied the Defendants' Motion to Dismiss, holding:

> ...KRS 344 makes it unlawful for an employer to discriminate against an individual on the basis of race or sex, as well as other classes. KRS 344.030 defines "employer" as "a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year ...." And KRS 344.010(1) defines "person" to include "the state, any of its political or civil subdivisions or agencies." The Department of Military Affairs, Army National Guard is attached to the office of the governor. KRS 36.010(5). As such, it falls within the definitions and provisions of KRS Chapter 344, and specifically KRS 344.010(1). Consequently, the Guard is subject to suit under KRS Chapter 344, and this Court does have subject matter jurisdiction ....

While the Court realizes another Circuit Judge's opinion cannot be cited as precedent, it nonetheless finds the Jefferson Circuit Court's reasoning compelling. This conclusion is supported by a recent Sixth Circuit decision, Gilbert v. United States, 165 F.3d 470 (6th Cir. 1999), where the court considered whether Kentucky National Guard

members who took part in a Marijuana Strike Force did so in violation of the Posse Comitatus Act.[47] In concluding that the Act did not apply to the Kentucky National Guard, the court relied on the guardsmen's status as state servicemen. "The issue of status depends on command and control and not on whether: state or federal benefits apply; state or federal funds are being used; the authority for the duty lies in state or federal law; or any combination thereof." Id. at 473. Applying this rationale to the case at bar, the Court concludes that while the Plaintiffs were under the exclusive command of the Kentucky National Guard, the laws of the Commonwealth of Kentucky applied. This Court now holds that the Kentucky National Guard, while under state control, must abide by the provisions set forth in KRS 344. The allegations of discrimination made by the Plaintiffs cannot be summarily dismissed as non-justiciable under the guise of military discipline. For the foregoing reasons, the Defendants' Motion for Summary Judgment is denied on these grounds.

The Court now turns briefly to the Defendants' argument that the Plaintiffs' failure to follow the internal complaint procedures provided by the Kentucky National Guard precludes the filing of a civil action in this Court. The record reflects that the Plaintiffs claim their attempts to notify their

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[47] 18 U.S.C. § 1385 provides: "Whoever, except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years or both."

superior officers of the alleged racism resulted in no ameliorative action by the National Guard. Accordingly, the Plaintiffs argue they had no choice but to pursue relief in this Court. Regardless of the effectiveness of the Guard's complaint system, the Court finds that the Plaintiffs are not obligated to pursue non-mandatory[48] internal administrative remedies before bringing a civil suit for discrimination in circuit court. For this reason, the Court denies the Defendants' Motion for Summary Judgment on these grounds.

The Court now turns to the Plaintiffs' intentional infliction of emotional distress claims. This tort was established in Craft v. Rice, Ky., 671 S.W. 2d 247 (1984), and the Kentucky Supreme Court has identified the following elements:

> (1) the wrongdoer's conduct must be intentional and reckless; (2) the conduct must be outrageous and intolerable in that it offends against generally accepted standards of decency and morality; (3) there must be a causal connection between the wrongdoer's conduct and the emotional distress; and (4) the emotional distress must be severe.

Gilbert v. Barkes, Ky., 987 S.W. 2d 772, 777 (1999). For conduct to be actionable, it must be of a nature so outrageous and extreme to go beyond all possible

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[48] KRS 35.390 states that any member of the National Guard "who believes himself wronged by his commanding officer ... may complain to any superior officer ...."

bounds of decency and also must be regarded as atrocious and utterly intolerable in a civilized community. See Humana of Kentucky v. Seitz, Ky., 796 S.W.2d 1, 3 (1990). "It has not been enough that the defendant has acted with an intent which is tortuous ..., or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice'." Id, citing Restatement (Second) of Torts, § 46 Comment d. As noted by the United States Court of Appeals for the Third Circuit, "It is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress." Andrews v. City of Philadelphia, 895 F.2d 1469, 1487 (3rd Cir. 1990). Construing the allegations set forth in the complaint in the light most favorable to the Plaintiffs, this Court is unable to conclude that the conduct complained of is sufficiently outrageous and intolerable as to establish the necessary elements of this tort. While the remarks the Plaintiffs allege they were subjected to are certainly inappropriate, the Court finds this purported conduct falls short of the standards set out above. For this reason, the Court grants the Defendants' Motion for Summary Judgment on the Plaintiffs' intentional infliction of emotional distress claim in each of the pending cases.

The final matter this Court will address is the status of Lieutenant Colonel Clark in this proceeding. The complaint filed by Robert Jones names Clark as a defendant, but fails to specify whether he is being sued in his official or individual capacity. Due to this lack of specificity, this Court will construe the complaint against Clark as an official capacity suit.

As such, Clark is dismissed from this action in his individual capacity.

For the foregoing reasons, the Court **DENIES** the Defendants' Motion for Summary Judgment in part and **GRANTS** the Motion in part. Any argument presented by the parties, whether addressed in this opinion or not, has been reviewed and considered by this Court.

So ordered this 19th day of January, 2001.

Roger L. Crittenden, Judge
Franklin Circuit Court

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The following are relevant provisions from **42 U.S.C. 2000e, "Title VII":**

An Act

To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Civil Rights Act of 1964".

* * *

DEFINITIONS

SEC. 2000e. *[Section 701]*

For the purposes of this subchapter-

(a) The term ``person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, jointstock companies, trusts,

unincorporated organizations, trustees, trustees in cases under title 11 *[bankruptcy]*, or receivers.

(b) The term ``employer'' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of title 5 *[of the United States Code]*), or ....persons having fewer than twentyfive employees (and their agents) shall not be considered employers.

(f) The term ``employee'' means an individual employed by an employer, except that the term ``employee'' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

UNLAWFUL EMPLOYMENT PRACTICES

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including onthejob training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter,

(1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and ....

....

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national

origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 *[section 6(d) of the Fair Labor Standards Act of 1938, as amended]*.

....

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

....

(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

....

EMPLOYMENT BY FEDERAL GOVERNMENT

SEC. 2000e-16. *[Section 717]*

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive agencies *[other thanthe General Accounting Office]* as defined in section 105 of title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission *[Civil Service Commission]* shall have authority to enforce the provisions of subsection (a) of this section

through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission *[Civil Service Commission]* shall-

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of

discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to-

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

....

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

The following are relevant provisions from **Kentucky Revised Statutes, KRS 344, et seq.:**

344.010 DEFINITIONS FOR CHAPTER

In this chapter:
(1) "Person" includes one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, fiduciaries, receivers, or other legal or commercial entity; the state, any of its political or civil subdivisions or agencies.
....
(5) "Discrimination" means any direct or indirect act or practice of exclusion, distinction, restriction, segregation, limitation, refusal, denial, or any other act or practice of differentiation or preference in the treatment of a person or persons, or the aiding, abetting, inciting, coercing, or compelling thereof made unlawful under this chapter.

344.020 PURPOSES AND CONSTRUCTION OF CHAPTER; EFFECT

(1) The general purposes of this chapter are:
(a) To provide for execution within the state of the policies embodied in the Federal Civil Rights Act of 1964 as amended (78 Stat. 241) [FN1], Title VIII of the Federal Civil Rights Act of 1968 (82 Stat. 81) [FN2], the Fair Housing Act as amended (42 U.S.C. 360), the Federal Age Discrimination in Employment Act of

1967 (81 Stat. 602) [FN3], the Americans with Disabilities Act of 1990 (P.L. 101-336) [FN4], and the Civil Rights Act of 1991 as amended (P.L. 102-166, amended by P.L. 102-392);

(b) To safeguard all individuals within the state from discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability as defined in KRS 344.010 and KRS 344.030; thereby to protect their interest in personal dignity and freedom from humiliation, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest which would menace its democratic institutions, to preserve the public safety, health, and general welfare, and to further the interest, rights, and privileges of individuals within the state;

....

(2) This chapter shall be construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

(3) Nothing in this chapter shall be construed as indicating an intent to exclude local laws on the same subject matter not inconsistent with this chapter.

(4) Nothing contained in this chapter shall be deemed to repeal any other law of this state relating to discrimination because of familial status, race, color, religion, national origin, sex, age forty (40) and over, or because of the person's status as a qualified individual with a disability as defined in KRS 344.030.

344.030 DEFINITIONS FOR KRS 344.030 TO 344.110

For the purposes of KRS 344.030 to 344.110:

....

(2) "Employer" means a person who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year and an agent of such a person, except for purposes of determining discrimination based on disability, employer means a person engaged in an industry affecting commerce who has fifteen (15) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding calendar year, and any agent of that person, except that, for two (2) years following July 14, 1992, an employer means a person engaged in an industry affecting commerce who has twenty-five (25) or more employees for each working day in each of twenty (20) or more calendar weeks in the current or preceding year, and any agent of that person. For the purposes of determining discrimination based on disability, employer shall not include:

(a) The United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

....

(5) "Employee" means an individual employed by an employer, but does not include an individual employed by his parents, spouse, or child, or an individual employed to render services as a domestic in the home of the employer.

....

(8) The terms "because of sex" or "on the basis of sex"

include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in this section shall be interpreted to permit otherwise.

344.040 DISCRIMINATION BY EMPLOYERS

It is an unlawful practice for an employer:
(1) To fail or refuse to hire, or to discharge any individual, or otherwise to discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment, because of the individual's race, color, religion, national origin, sex, age forty (40) and over, because the person is a qualified individual with a disability...;

(2) To limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee, because of the individual's race, color, religion, national origin, sex, or age forty (40) and over, because the person is a qualified individual with a disability, or because the individual is a smoker or nonsmoker, as long as the person complies with any workplace policy concerning smoking; or....